Supreme Court, U.S.
FILED
98 311 AUG 19 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ISLANDER EAST RENTAL PROGRAM AND
J. RAY RILEY,

Petitioners,

v.

LOWRY BARFIELD, ELIZABETH PARR, JAMES B. PENNY,
LOCKWOOD SEEGAR, ISLANDER EAST ASSOCIATION,
AND BILL FERGUSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. RAY RILEY
Attorney for Petitioners and Pro Se
6213 Edloe Street
Houston, Texas 77005
(713) 667-1170
(713) 667-5945 (fax)

45 pp

QUESTIONS PRESENTED

This petition presents the following questions:

1. In a civil action involving both legal and equitable claims, whether the constitutional right to trial by jury is violated by an order of the trial court precluding the plaintiffs from presenting to the jury evidence of damages necessary to prove their legal claims tried to the jury when the damages arose after the trial court first exercised its equity jurisdiction?

2. In a civil action involving both legal and equitable claims, whether the constitutional right to due process of law is violated by an order of the trial court precluding the plaintiffs from presenting to the jury evidence of damages necessary to prove their legal claims tried to the jury when the damages arose after the trial court first exercised its equity jurisdiction?

LIST OF PARTIES

The parties to the proceedings below are the following:

1. Petitioners:

Dr. Travis Drummond
Nell Drummond
Dr. Frank Emery
James Hamilton
William F. Howell
Max Petty
J. Ray Riley
Alfred L. Ruebel
Lester Swanson
Ted Thorjussen
Mark Troy, and
Mavis Trubell.

The Petitioners were participants in an unincorporated joint venture called the Islander East Rental Program (renamed Galveston Beach Condo Rentals).

2. Respondents:

Lowry Barfield
Bill Ferguson
Elizabeth Parr
James B. Penny
Lockwood Seegar, and
Islander East Association.

The Islander East Association is an incorporated association of the owners of units at the Islander East Condominium, Galveston, Texas.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
A. The Magistrate Judge's Order Curtailing Petitioners' Right to Trial By Jury Conflicts With This Court's Earlier Pronouncements and Fed.R.Civ.P.42(b)	5
B. Curtailment of the Right to Trial By Jury Must Be Scrutinized With the Utmost Care and Vigilance	6
Conclusion	8
Appendix:	
Opinion of United States Court of Appeals for the Fifth Circuit on Appeal	A-1
Opinion of United States Court of Appeals for the Fifth Circuit on Appeal on Petition for Rehearing	A-14
Rule 65 Agreements of Parties and District Court's August 2, 1995 Approval Order	A-15
Petitioners' Amended Notice of Appeal	A-21
Petitioners' Petition for Rehearing	A-23
Pages 91-95 of Trial Transcript (Magistrate Judge's Colloquy with Petitioners' Trial Counsel Concerning Damages Arising After August 2, 1995	A-28

TABLE OF AUTHORITIES

PAGE

CASES

Beacon Theatres, Inc. v. *Westover,* 359 U. S. 500 (1959) 5, 6, 7, 8
Dairy Queen, Inc. v. *Wood, 369 U. S. 469 (1962)* 5, 6, 7, 8
In re Beverly Hill Fire Litigation, 695 F.2d 207, 217 (6th Cir. 1982) 7

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V 2
United States Constitution, Amendment VII 2

STATUTES AND RULES

15 U.S.C. Section 1051 2-3
28 U.S.C. Section 1254(1) 1
Fed.R.Civ.P. 42(b) 5, 6
Fed.R.Civ.P. 65 3

IN THE

Supreme Court of the United States

ISLANDER EAST RENTAL PROGRAM AND
J. RAY RILEY,

Petitioners,

V.

LOWRY BARFIELD, ELIZABETH PARR, JAMES B. PENNY,
LOCKWOOD SEEGAR, ISLANDER EAST ASSOCIATION,
AND BILL FERGUSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause No. 96-41275. The judgment was entered March 24, 1998. Rehearing was denied May 21, 1998.

OPINIONS BELOW

The unreported opinion of the Court of Appeals and its order denying rehearing are reprinted in the Appendix to this petition beginning on pages A-1 and A-14, respectively.

STATEMENT OF JURISDICTION

The judgment which this Court is asked to review was entered on March 24, 1998. Rehearing was denied May 21, 1998. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This federal suit arose out of Petitioners' charge that Respondents were attempting to interfere unlawfully with Petitioners' ownership and operation of a condominium rental program. Suit was filed on July 6, 1995, four days after the individual Respondents attempted to take over control of the Islander East Rental Program by voting as a board of directors of the Islander East Association to abolish the Islander East Rental Program's participant-elected Executive Committee which had exercised oversight and management of the Islander East Rental Program for seventeen years. In light of the Petitioners' legal resistance, the Respondents established a separate rental program.

Petitioners made legal and equitable claims in the suit. Each side sought declaratory judgment of ownership of the same service mark. The district court asserted jurisdiction of federal questions arising under the Trademark Act of 1946, as amended, 15 U.S.C.

Section 1051, et seq., and pendent jurisdiction over the Texas state claims arising under the common law.

At the request of the district court on August 1, 1995, the parties submitted certain agreements to be included in a Rule 65 order[1] that were approved by the court on August 2, 1995. These agreements included enjoining each side from using the contested service mark until further order of the court and providing an operating framework through September 30, 1995, for participants who wished to withdraw from the Islander East Rental Program and join the Respondents' new rental program.[2]

At the time the jury trial commenced, Petitioners had pled causes of action that included claims for tortious interference with business relationships involving Petitioners' customers, employees and other joint venturers; civil conspiracy to misappropriate the assets of Petitioners and to violate rights of the Petitioners and their Executive Committee; misappropriation of Petitioners' reservations and customer lists; conversion of Petitioner's properties; and breach of fiduciary duties owed to Petitioners. Petitioners sought compensatory and exemplary damages.

Petitioners also pled that Respondents had continued to use the contested service mark in violation of the agreed mutual injunction prohibiting its use and sought damages related to the alleged service mark violations. In response Respondents filed a motion *in limine* to exclude from the jury evidence of the alleged injunction violations and any resultant damages. The magistrate judge presiding over the jury trial concluded that any damages of whatever nature occurring from August 2, 1995 forward were within the court's equity jurisdiction and should be tried to the court rather than to the jury. Accordingly, *the magistrate judge time-bifurcated the trial by ordering that all evidence presented to the jury be limited to facts*

---

[1] See Fed.R.Civ.P. 65.

[2] A copy of the court approved Rule 65 agreements is reprinted in the Appendix beginning at page A-15.

that occurred before August 2, 1995, the date the district court had approved the Rule 65 agreements of the parties.[3] The magistrate judge informed the jury that it was only necessary for the jury to hear evidence of facts which occurred prior to August 2, 1995, and the jury was instructed to confine its deliberations to such facts. For purposes of the August 2, 1995 cut-off, the magistrate judge made no distinction between damages related to Petitioners' legal claims and damages related to the alleged injunction violations and any resultant damages.

Broad-form jury interrogatories were submitted to the jury for each of Petitioners' asserted causes of action for intentional inference with existing contracts, conversion, breach of fiduciary duties, and civil conspiracy. Each broad-form interrogatory addressed liability, damages and proximate causation of the damages.[4] The jury was charged that an act or omission was a proximate cause of the plaintiff's injuries or damages *if it appeared from the evidence that*

---

[3] A relevant portion of the magistrate judge's colloquy with Petitioners' trial counsel is reprinted in the Appendix beginning at page A-28.

[4] The interrogatories material to Petitioners' petition for writ of certiorari are the following:

INTERROGATORY NO. 5

Do you find from a preponderance of the evidence that the defendants intentionally interfered with plaintiffs' existing contracts and that such was a proximate cause, in whole or in part, of the damages to the plaintiffs, if any?

ANSWER: "Yes" or "No".

INTERROGATORY NO. 6

Do you find from a preponderance of the evidence that the defendants converted properties of the plaintiffs and that such was a proximate cause, in whole or in part, of the damages to the plaintiffs, if any?

ANSWER: "Yes" or "No".

INTERROGATORY NO. 8

Do you find from a preponderance of the evidence that the defendants breached their fiduciary duty to plaintiffs and that such was a proximate cause, in whole or in part, of the damages to the plaintiffs, if any?

ANSWER: "Yes" or "No".

the injury or damage was a reasonably foreseeable consequence of the act or omission.

Final judgment was entered in favor of Respondents on the jury verdict, and the magistrate judge denied Petitioners' motion for new trial which argued that Petitioners had been denied due process of law as a result of the magistrate judge's order excluding damages evidence necessary to fairly present Petitioners' claims to the jury. The Court of Appeals affirmed without explicitly addressing Petitioners' argument that they had been denied their constitutional right to a jury trial on the element of damages related to their legal claims.[5] This was brought to the appellate court's attention in Petitioners' Petition for Rehearing which was denied without opinion. A copy of the petition is reprinted in the Appendix, beginning at page A-23.

REASONS FOR GRANTING THE WRIT

A. The Magistrate Judge's Order Curtailing Petitioners' Right to Trial By Jury Conflicts With This Court's Earlier Pronouncements and Fed.R.Civ.P. 42(b)

This Court should issue a writ of certiorari because the magistrate judge's order below curtailing Petitioners' constitutional right to a jury trial, effectively affirmed by the Fifth Circuit panel, conflicts with this Court's decisions in *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood,*

INTERROGATORY NO. 10

Do you find from a preponderance of the evidence that the defendants engaged in a civil conspiracy and that such was a proximate cause, in whole or in part, of the damages to the plaintiffs, if any?

ANSWER: "Yes" or "No".

[5] The Court of Appeals instead addressed a separate appellate point raised by Petitioners as to whether they were entitled to a jury trial concerning damages arising from Respondents' use of the contested service mark in violation of the mutually agreed injunction.

369 U. S. 469 (1962).[6] In addition, the magistrate judge's order conflicts with Fed.R.Civ.P. 42(b) which provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, *always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution* or as given by a statute of the United States.

(Emphasis added.)

B. Curtailment of the Right to Trial By Jury Must Be Scrutinized With the Utmost Care and Vigilance

The maintenance of the jury as a fact-finding body is of such importance that any attempt to curtail the right to a jury trial must be scrutinized with the utmost care. *Beacon*, 359 U.S. at 501. The *Beacon* case came before this Court under these circumstances:

> "Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut [the right of trial by jury] by having federal courts in which cases involved both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in Beacon Theatres, Inc. v. Westover, a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury."

Dairy Queen, 369 U.S. at 472.

---

[6] Alternatively, this Court may exercise its supervisory power over the appellate court decision sanctioning a magistrate judge's order which is a substantial departure from the accepted and usual course of judicial proceedings in which concurrent legal and equity jurisdiction is exercised.

As in the instant case, the *Beacon* case involved the district court's determination that it could properly decide legal issues, once it obtained jurisdiction, without deference to the right to trial by jury. See *Beacon,* 359 U.S. at 509. This Court emphasized that it could not then even anticipate a case where the right to a jury trial of legal issues could be lost through prior determination of equitable claims. *Id.* at 510-511. *Beacon* stands for the proposition that *any* legal issues for which a trial by jury is timely and properly demanded be submitted to a jury except under the most imperative circumstances. *Dairy Queen,* 369 U.S. at 472-3. The *Beacon* case was not followed by the magistrate judge below. He did not permit Petitioners to develop their damages as a necessary element of their legal causes of action. The magistrate judge's time-bifurcation curtailment prevented Petitioners from proving up compensatory damages that occurred during the thirteen month period from August 2, 1995, to the commencement of trial on September 24, 1996. Because Petitioners were effectively precluded from proving up damages occurring on or after August 2, 1995 as an essential element of each of the above mentioned causes of action, the jury had no choice but to return a verdict favorable to Respondents in answer to the jury broad-form interrogatories. It is prejudicial to a plaintiff who is deprived of the legitimate right to place before the jury the circumstances of his entire cause of action brought into court. *In re Beverly Hill Fire Litigation,* 695 F.2d 207, 217 (6th Cir. 1982).

In the *Dairy Queen* trademark infringement case, the district court had refused a demand for a jury trial on factual issues related to the question of whether there had been a breach of contract. The Court of Appeals improperly denied a petition for mandamus, and this Court reversed and remanded for further proceedings consistent with its determination that a jury trial should have been granted. This Court importantly noted at the outset of its opinion that the right to trial by jury may not be lost as to legal issues where those issues are characterized as "incidental" to equitable issues. *Dairy*

Queen, 369 U. S. at 470. Petitioners submit that under *Dairy Queen* it was plain error for the magistrate judge below to preclude Petitioners from presenting evidence of their legal issue damages arising after August 2, 1995 to the jury.

CONCLUSION

Petitioners' Seventh Amendment right to a trial by jury entitled them to present to the jury evidence of damages related to their legal claims, notwithstanding the exercise of the lower court's equity jurisdiction or the fact that such damages may have been incurred after the lower court began the exercise of its equity jurisdiction. In granting this petition for a writ of certiorari, this Court can enforce its decisions in *Beacon* and *Dairy Queen* and clarify if necessary the nature of a court's concurrent exercise of legal and equity jurisdiction.

WHEREFORE, it respectfully is prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

J. RAY RILEY
Attorney for Petitioners and Pro Se

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41275

ISLANDER EAST RENTAL PROGRAM; J. RAY RILEY,

Plaintiffs-Appellants,

v.

LOWRY BARFIELD; ELIZABETH PARR; JAMES B PENNY; LOCKWOOD SEEGAR; ISLANDER EAST ASSOCIATION; BILL FERGUSON,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(G-95-CV-404)

Before REYNALDO G. GARZA, KING, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Plaintiffs-appellants Islander East Rental Program and J. Ray Riley appeal the magistrate judge's entry of a permanent injunction against them, his decision not to issue a civil contempt citation for Defendants' alleged violation of a consent preliminary injunction, and his denial of their motion for new trial. We affirm the magistrate judge's judgment declining to issue a civil contempt citation and denying Plaintiffs' motion for new trial. We affirm the permanent injunction except for Paragraphs (e) and (g) thereof and except insofar as it fails to include a statement of reasons justifying the issuance thereof, and we remand to the magistrate judge with instructions to revise or delete Paragraphs (e) and (g) and to add to the injunction a statement of reasons justifying its issuance as required by Federal Rule of Civil Procedure 65(d).

* Pursuant to 5TH CIR. R. 47. 5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff-appellant Islander East Rental Program (the Program) has, since 1977, been responsible for marketing and administering a rental pool consisting of some of the condominium units located in the Islander East condominium development in Galveston, Texas. The Program has a four-member executive committee that administers the pool and markets the rental units, and it has maintained its offices in the main lobby of the Islander East development. Plaintiff-appellant J. Ray Riley has been the chairman of the Program's executive committee since its inception. Riley and the Program (collectively, Plaintiffs) contend that the Program is an autonomous organization that is fully independent; they characterize the Program as a joint venture between its members.

Defendants-appellees the Islander East Association (the Association) and its five board members (collectively, Defendants) serve as the condominium owners association and administer and enforce the condominium agreement that governs the Islander East development. Until 1977, the Association operated a rental pool program, and Defendants contend that the Program is a subordinate part of the Association that is essentially a continuation of the Association's earlier rental pool.

On July 2, 1995, the Association board voted to abolish the executive committee of the Program and take over the administration of the Program directly. Four days later, the Program filed this action[1] alleging claims of civil conspiracy, trademark and service mark infringement, unfair competition, misappropriation, conversion, breach of duty of good faith, and tortious interference with business relationships. The Association counterclaimed, alleging similar injuries and requesting a declaratory judgment that it owned the Islander East mark. Both sides sought a preliminary injunction, and the district court therefore instructed the parties to mutually propose an injunction to bind each of them until the matter was

[1] Riley was later added to the action as a separate plaintiff.

resolved. On August 2, 1995, with the consent of the parties, the district court entered a preliminary injunction barring all parties from using the Islander East mark in relation to condominium rentals.

By agreement, the case was thereafter tried before a magistrate judge who bifurcated the trial. The first part was tried to the jury, and the magistrate judge limited the evidence to events that took place prior to the entry of the consent preliminary injunction on August 2, 1995. He then entered a directed verdict for the Program on all of the Association's counterclaims except the claim relating to ownership of the mark, and the jury thereafter determined that the Association owned the mark.

The second part of the trial involved whether the Program was entitled to compensatory damages for Defendants' alleged violations of the preliminary injunction and whether the injunction was wrongfully issued. Because the jury determined that the Association owned the Islander East mark, the magistrate judge declined to enter a civil contempt citation against Defendants. Neither party took any money from the judgment, and the court dissolved the preliminary injunction.

The magistrate judge's final judgment included the following permanent injunction against Plaintiffs:

(a) From using or commercially exploiting any of the service marks, trademarks and trade names of the Islander East Association consisting of "Islander East" or any other service mark, trademark or trade name alone or in combination with any design or logo, relating to condominium rental services;

(b) From undertaking any activity which falsely tends to represent the services of the Islander East Rental Program or J. Ray Riley as those of the Islander East Association, or activities that are likely to cause confusion or mistake in the mind of the public, or will cause consumers to believe that

the services of the Islander East Rental Program or J. Ray Riley are sponsored or somehow affiliated with the services of the Islander East Association;

(c) From undertaking any activity which disparages or tends to diminish or erode the public's recognition of the Islander East Association's service marks, trademarks and trade names, including, in whole or in part, "Islander EastN and design or logo;

(d) From passing off or assisting others in selling or passing off the services of the Islander East Rental Program and J. Ray Riley as those of the Islander East Association;

(e) From interfering in any way with the continued operation of any condominium rental program operated by the Islander East Association;

(f) From interfering with or diverting reservations booked through any condominium rental program operated by the Islander East Association;

(g) From interfering with or otherwise threatening the participants in any condominium rental program operated by the Islander East Association; and

(h) From interfering with or otherwise threatening any officers, directors, or employees of the Islander East Association in connection with the operation of any condominium rental program.

Following entry of judgment, Plaintiffs moved for a new trial, and the magistrate judge denied their motion. Plaintiffs now appeal the permanent injunction, the court's decision not to issue a civil contempt citation for the Association's alleged violation of the preliminary injunction, and the denial of their motion for new trial.

II. STANDARD OF REVIEW

We apply the same standard of review to the findings and conclusions of the magistrate judge that we would apply to a

decision of the district court. Taylor v. Domestic Remodeling, Inc., 97 F.3d 96, 98 (5th Cir. 1996). "Conclusions of law made by the magistrate judge are therefore subject to de novo review while findings of fact made by the magistrate judge are upheld unless such findings are clearly erroneous." Id.

III. DISCUSSION

A. Permanent Injunction

Plaintiffs contend that the magistrate judge abused his discretion in entering the permanent injunction because it was not based "on any established principles of law" or on "any factual findings relevant to whether injunctive relief should issue." Plaintiffs further argue that the injunction violates the requirements of Federal Rule of Civil Procedure 65(d) because it is not sufficiently specific and the reasons for its issuance are not set forth. They insist that the order is so vague that it is impossible to discern what they are prohibited from doing. Specifically, Plaintiffs point to subparagraph (g) of the injunction, which states, in part, that they are prohibited from "interfering with or otherwise threatening the participants in any condominium rental program operated by the Islander East Association." Plaintiffs argue that this language may serve to prevent them from enforcing their rights and thus creates a "second class" category of homeowners.

Defendants respond that the district court was justified in entering the permanent injunction because it issued a declaratory judgment that the Islander East mark belonged to the Association, and 28 U.S.C. § 2202 states that, "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. They contend that the magistrate judge did not abuse his discretion in finding that a permanent injunction was warranted. Defendants further argue that the injunction is not unreasonably vague.

We review a district court's grant or denial of a permanent injunction for abuse of discretion. *Peaches Entertainment Corp.* v. *Entertainment Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995).

> The district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief.

Id.

A district court may issue a permanent injunction where there is a real danger that the act prohibited by the injunction would occur in its absence and will cause injury to the party requesting the injunction. See llA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2942, at 45-47 (1995). The form of the injunction must follow Federal Rule of Civil Procedure 65(d), which requires that "[e]very order granting an injunction... shall set forth the reasons for its issuance; shall be specific in terms: shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." FED. R. CIV. P. 65(d)

> The requirements of Rule 65(d) are not purely technical, but serve to "prevent uncertainty and confusion" by those faced with injunctive orders and to "avoid the possible founding of a contempt citation on a decree too vague to be understood," as well as to fs tate informed and intelligent appellate review.

Citizen Band Potawatomi Indian Tribe of Okla. v. *Oklahoma Tax Comm'n*, 969 F.2d 943, 946 n.3 (10th Cir. 1992) (quoting Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam)). Although the requirements of Rule 65(d) are mandatory, elaborate detail is unnecessary; we have explained that "[a]n injunction must simply be framed so that those enjoined will know what conduct the court

has prohibited." *Meyer* v. *Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).

Having reviewed the record and the briefs in this case, we are persuaded that the magistrate was justified in deciding to enter a permanent injunction. *Cf. Seattle-First Nat'l Bank* v. *Manges*, 900 F.2d 795, 800 (5th Cir. 1990). Nevertheless, the "no-reference requirement [of Rule 65(d)] has been strictly construed in this circuit to require that parties be able to interpret the injunction from the four corners of the order as required by Rule 65(d)." *Id.* (alteration in original and internal citations and quotation marks omitted); *see also Landmark Land Co.* v. *Office of Thrift Supervision*, 990 F.2d 807, 811 (5th Cir. 1993) (vacating and remanding an injunction based on the district court's failure to comply with Rules 52(a) and 65(d) despite the appellate court's conclusion that the district court did not abuse its discretion in granting the injunction). Because the injunction entered in this case does not "set forth the reasons for its issuance, we conclude that it fails to conform to Rule 65(d) and therefore must be remanded to the district court for entry of such reasons. FED. R. CIV. P. 65(d).

Turning to the content of the injunction, we conclude that Paragraphs (a) through (d) are clear enough to notify Plaintiffs as to what actions are prohibited. Paragraph (a) of the injunction precludes Plaintiffs from using any service marks, trademarks, or trade names belonging to the Association; it does not prevent Plaintiffs from using any different or unrelated service mark, trademark, or trade name. Similarly, Paragraphs (b) through (d) specifically prevent Plaintiffs from utilizing the Islander East mark or from representing themselves as related to the Association. In addition, Paragraph (f) is sufficiently specific in that it focuses on the narrow issue of interfering with or diverting reservations from the Association's rental program. We do not read Paragraph (f) as prohibiting any lawful competition with the Association's rental program. Paragraph (h) is sufficiently specific because it is narrowly tailored to protect only "officers, directors or employees of

the Islander East Association in connection with the operation of any condominium rental program" and does not prevent Plaintiffs from exercising their legal rights against the named individuals outside of the rental program context.

However, we do not think that Paragraphs (e) and (g) satisfy Rule 65(d)'s specificity requirement. Paragraph (e) is overbroad. Its requirement that Plaintiffs refrain from "interfering in any way with the operation of the rental program fails to identify what specific actions are prohibited and subjects Plaintiffs to possible liability for exercising legal rights that they possess as condominium owners. *See, e.q., Pereqrine Myanmar Ltd.* v. *Seqal,* 89 F.3d 41, 52 (2d Cir. 1996) (vacating a paragraph of an injunction that left the appellant in the position of "risk[ing] contempt if she guesses wrong about what constitutes a "reasonably needful action"); *Federal Election Comm'n* v. *Furqatch,* 869 F.2d 1256, 1263 (9th Cir. 1989) (remanding an injunction to the district court for clarification of what conduct was prohibited because the phrase "similar violations" was impermissibly vague); *Pavne* v. *Travenol Labs. Inc.,* 565 F.2d 895, 897-98 (5th Cir. 1978) (finding that an injunction paragraph prohibiting the defendants from "discriminating" failed to satisfy the specificity requirement of Rule 65(d)); *Wynn Oil Co.* v. *Purolator Chem. Corp.,* 536 F.2d 84, 86 (5th Cir. 1976) (finding that a portion of an injunction prohibiting the appellants from "slandering and disparaging" the Wynn Oil Co. and its products was "impermissibly vague").

Paragraph (g) is overbroad because it would prohibit Plaintiffs from taking any action against any participant in the Association's rental program, including, for example, a meritorious suit brought against one of the participants to recover a debt and having nothing to do with the Islander East development. Paragraph (g) should be reformed so as to specify that it prohibits Plaintiffs from interfering with or threatening the participants in the Association's rental program *on the basis of or in connection with their participation in*

any condominium rental program.[2] See Pereqrine Mvanmar Ltd., 89 F.3d at 51-52 (upholding a portion of an injunction banning the appellant from "communicating with MAFCO's officers, directors, employees, and agents on matters pertaining to MAFCO or plaintiffs" because it was narrowly tailored to prohibit only interference with the company's management communications). On remand, the district court is instructed to reform the injunction so as to "set forth the reasons for its issuance" as required by Rule 65(d). FED. R. CIV. P. 65(d). In addition, the court is instructed to either rewrite Paragraphs (e) and (g) to conform with the specificity requirement of Rule 65(d) or delete them altogether.[3] Until then, with the exceptions of Paragraphs (e) and (g), the injunction shall continue in force according to its interpretation in this opinion. See Seattle-First Nat'l Bank, 900 F.2d at 800.

B. Preliminary Injunction

Plaintiffs next argue that the district court erred in refusing to give them the opportunity to prove that Defendants violated the preliminary injunction and that Plaintiffs were damaged as a result.[4]

---

[2] We note that the inclusion of such language in Paragraph (h) is what saves it from the same failing. *See, e.q., Pereqrine Mvanmar Ltd.*, 89 F.3d at 51 (upholding a paragraph of an injunction prohibiting the defendant from "interfer[ing] with 'plaintiffs' business *or* plaintiffs' interest in MAFCO").

[3] While we have attempted to identify the problems with these paragraphs as written and have made some suggestions as to how they might be reformed, we emphasize that, on remand, the is free to exercise its discretion (within the bounds of Rule 65(d) and circuit precedent) in reforming these paragraphs to address the problems that it identifies as warranting the injunction. See *Young* v. *Pierce*, 822 F.2d 1368, 1374 (5th Cir. 1987) ("It is properly the role of the district court, familiar as it is with this case, to attempt the modification of the injunction to accord with the dictates of Rule 65(d).").

[4] Plaintiffs also contend that they were denied their Seventh Amendment right to a jury trial on this issue. This argument lacks merit. "There is no right to a trial by jury for the violation of an order of court when the proceeding is for civil contempt unless a statute so provides." IIA WRIGHT, SUPra, § 2960, at 379 (citing *Shillitani* v. *United States*, 384 U.S. 364 (1966)). Plaintiffs have identified no

We review a district court's grant or denial of relief in a civil contempt proceeding for abuse of discretion. *Washington-Baltimore Newspaper Guild, Local 35* v. *Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980). As we have explained,

> Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's non-compliance . . . .
>
> A party held only in civil contempt by way of compensation to his adversary will be absolved of liability if the court order was invalid or erroneous. The adversary should realize no gain from orders to which he was not entitled.

Norman Bridge Drug Co. v. *Banner*, 529 F.2d 822, 827-28 (5th Cir. 1976); see also *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 295 (1947) (noting that, although a party "may be punished for criminal contempt for disobedience of an order later set aside on appeal," it does not follow that "the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order"). In this case, Plaintiffs seek compensatory civil contempt damages for Defendants' alleged violations of the preliminary injunction. The magistrate judge determined that Plaintiffs were not entitled to civil contempt damages due to the outcome of the suit regarding the ownership of the Islander East mark. We agree. As the resolution of the main case indicates that Plaintiffs were not entitled to use the Islander East mark and that the mark belonged to Defendants, Plaintiffs have not suffered "losses flowing from [Defendants' alleged] noncompliance" with the injunction and therefore are not entitled to recover damages on that basis. *Norman Bridge*, 529 F.2d at 827.[5]

---

statutory authority providing a right to a jury trial in the instant situation.

[5] Plaintiffs contend that we should treat this injunction differently than the one at issue in *Norman Bridge* because the parties in this case consented to the injunction. They urge this court to follow the Third Circuit's decision in *American Greetings Cors.* v. *Dan-Dee Imports,*

C. Motion for New Trial

Plaintiffs next argue that the magistrate judge erred in denying their motion for new trial. They contend that the jury's verdict finding that the Association owns the Islander East mark and finding for Defendants on the other counts of wrongdoing was clearly erroneous.

A grant of a new trial is left to the broad discretion of the trial court, but that discretion is "tempered by the deference due to a jury." *Scott* v. *Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989). We review a district court's denial of a motion for new trial for abuse of discretion, thereby recognizing "the deference that is due the trial court's first-hand experience of the witnesses, their demeanor, and the over-all context of the trial." *Dawson* v. *Wal-*

Inc., 807 F.2d 1136 (3d Cir. 1986). *American Greetings* involved a suit brought by a marketer of a line of teddy bears against a competitor alleging various copyright and trademark infringements. *Id.* at 1138. The district court entered an injunction against the defendant, prohibiting it from marketing its line of teddy bears. *Id.* The defendant later consented to an order prohibits it from distributing certain types of related stuffed animals pending a hearing on the broadening or narrowing of the original injunction. Id. Thereafter, the defendant continued to market a "plush dog with tummy graphics," and the district court found it in contempt of the consent order. *Id.* at 1140. On appeal, the Third Circuit held that the defendant could not challenge the civil contempt citation by challenging the validity of an injunction to which it had consented. *Id.* at 1148.

American Greetings is inapposite. In *American Greetings* the district court exercised its discretion to issue a civil contempt citation where the defendant disobeyed an injunction to which it had consented. *Id.* In contrast, in this case the magistrate judge exercised his discretion not to issue a civil contempt citation because the main case resulted in a determination that the Islander East mark belonged to the Association and not to the Program. Defendants are not arguing that because the injunction was invalid the magistrate judge could not have held them in civil contempt; rather they are simply arguing that the magistrate judge did not abuse its discretion in choosing not to enter a civil contempt citation against them. The Third Circuit's decision in American Greetings does not comment on whether a district court abuses its discretion in deciding not to issue a civil contempt citation where a party disobeys a preliminary injunction that was entered with their consent and that was later found to have been erroneous.

Mart Stores, Inc., 978 F.2d 205, 208 (5th Cir. 1992). As we have explained,

> The reviewing court gives somewhat greater deference when the district court has denied the new trial motion and left the jury's determinations undisturbed. New trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great weight of the evidence.

Id. (internal citations omitted). We review all of the evidence presented in the light most favorable to the jury's verdict, and we will not overturn it unless the evidence "points 'so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary [conclusion].' " *Jones* v. *Wal-Mart Stores, Inc.*, 870 F.2d 982, 987 (5th Cir. 1989) (alteration in original). Thus, mere conflicting evidence or evidence that would support a different conclusion by the jury cannot serve as the grounds for granting a new trial. *See Dawson*, 978 F.2d at 208. "Where the jury could have reached a number of different conclusions, all of which would have sufficient support based on the evidence, the jury's findings will be upheld." *Id.* Having reviewed the record and the briefs on appeal, we conclude that sufficient evidence existed to support the jury's verdict, and we therefore hold that the district court did not abuse its discretion in denying Plaintiffs' motion for new trial.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the magistrate judge declining to issue a civil contempt citation and denying Plaintiffs' motion for new trial. We AFFIRM the permanent injunction except for Paragraphs (e) and (g) thereof and except insofar as it fails to include a statement of reasons justifying the issuance thereof, and we REMAND to the magistrate judge with instructions to revise or delete Paragraphs (e) and (g) and to add a statement of reasons justifying the issuance of the permanent injunction as required by Rule 65(d). The magistrate judge is ordered to make the necessary revisions and addition within a

period of thirty days from the date of entry of judgment or from the date of entry of any order on rehearing, whichever comes later. Any further appeal shall be on an expedited basis and shall be to this panel. During the remand and prior to the entry of judgment by the magistrate judge on the revised permanent injunction, the existing permanent injunction, excepting only Paragraphs (e) and (g) thereof, shall continue in force in accordance with the interpretation thereof contained in this opinion.

AFFIRMED in part and REMANDED. Costs shall be borne by Plaintiffs.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41275

ISLANDER EAST RENTAL PROGRAM; J RAY RILEY,

Plaintiffs-Appellants,

v.

LOWRY BARFIELD; ELIZABETH PARR; JAMES B PENNY; LOCKWOOD SEEGAR; ISLANDER EAST ASSOCIATION; BILL FERGUSON,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas, Galveston

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, KING, AND BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied. The mandate shall issue forthwith.

ENTERED FOR THE COURT:

CAROLYN KING
United States Circuit Judge

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ISLANDER EAST RENTAL PROGRAM
and J. RAY RILEY
VS.
BILL FERGUSON, ET AL.
VS.
J. RAY RILEY

C. A. NO. G-95-404

PARTIES' JOINT PRESENTATION OF MATTERS TO BE INCLUDED IN RULE 65 ORDER

TO THE HONORABLE SAMUEL B. KENT, UNITED STATES DISTRICT JUDGE:

The parties jointly submit the following agreements they have reached, consistent with the Court's order of August 1, 1995.

1. Plaintiffs ("the Rental Program") and defendants ("the Board") will request the insurance carriers provide each party a bond in the amount of $5000 to be posted consistent with Fed. R. Civ. P. 65. If the insurance carriers object, or have not agreed with 10 days, the parties will each post a cash bond of $5000. The parties have agreed the effectiveness of the Court's injunctive order will not be conditioned on the posting of bonds.

2. A meeting of the Homeowners Association will take place on Saturday, September 9, 1995, at 2:00 p.m. The parties will each submit the name of two Galveston attorneys, by letter to the Court, from which the Court will appoint the Special Master to provide over the meeting. These names will be filed with the Court by August 17, 1995. Each side will be allowed up to 45 minutes for its presentation. Position materials must be mailed in advance of the

meeting by August 26, 1995. Absentee homeowners must provide their election in writing to the Special Master within seven business days after the meeting has adjourned.

3. Each party will file with the Court the name under which it will perform condominium rental and related housekeeping services, for approval by the Court, on August 26, 1995. Neither party may use the Islander East service mark, name or logo, or any confusingly similar service mark, name or logo, for condominium rental and related housekeeping services subject to further Court order. Either party, however, may represent that it offers rental services in the Islander East Condominium.

4. The Rental Program will continue to operate its existing rental business. A desk will be placed in the lobby of the Islander East condominium, to be manned by one employee during normal business hours (8:00 a.m. to 5:00 p.m. except 8:00 am. to 9:00 p.m. on Friday), on which may be displayed during normal business hours a reasonably-sized sign "Galveston Beach Condo Rentals." In addition to answering phones and checking in guests, light paperwork may be performed at the desk. A phone will be installed at the desk as an extension to the existing 765-9301 phone number, and will also provide for the Rental Program to receive calls under its new number. Calls answered at the main office desk which are for Rental Program business shall be transferred to the Rental Program desk.

5. The Rental Program maid service will be provided access to the units in the Program during normal business hours for the purpose of rendering housekeeping services. The maids will check in with the Board's employee on duty at the main office on arrival, and check out on completion of the maid services. Linens for use by the Rental Program will be stored in unit 405.

The Board will continue to allow the Rental Program to use the security services as a means of providing check in, credit payment, and keys to guests after normal business hours.

6. The existing participants in the Rental Program will remain in the program until and unless they deliver written notice to the Rental Program stating that they wish to withdraw from the Rental Program and state the effective date of future withdrawal. Such written notice must be delivered to the Rental Program by August 9, 1995. Advance reservations and deposits designated to units in the Rental Program will be retained as assets of the Rental Program except as to units which may be withdrawn from the Rental Program in accordance with the above provisions. All other assets of the Rental Program will remain with the Program subject to further court order.

Those participants who have given notice as of August 9, 1995 will not remain in the program. Advance reservations and deposits designated to those units will be transferred to and be an asset of the Board beginning the effective date of withdrawal. Any profits due to withdrawing participants in the program will be calculated based on the revenue and expenses generated from January 1, 1995 through the effective date of their withdrawal from the Rental Program.

The remaining participants in the Rental Program will be treated as "uncommitted". Advance reservations and deposits designated to the those units which are uncommitted will be continue to be managed by the Rental Program. After the Homeowners Association meeting on September 9, 1995, and the absentee election period, those uncommitted participants will be assigned to the respective program they elect. Thereafter, on September 30, 1995, the Rental Program will close its books with respect to the allocation of income and expenses for all units in its program, except the units with an earlier closing date. Any uncommitted participants who have elected to withdraw from the Rental Program will receive their distributions for the rentals through September 30, 1995, based on the reconciliation on September 30, 1995. This reimbursement right will be distributed in the same manner as routine third quarter distributions of the Rental Program.

7. An inventory of the withdrawing participant rental units will be conducted by the Rental Program the day following the effective date of withdrawal. The Board will receive two sets of linens, towels, and the other tangible inventory within the units of those withdrawing participants. The Board will also be transferred one of the maid carts of the Rental Program.

8. Recognizing that at present the above suit is an internal dispute only, and is not believed to be a matter of public knowledge, the parties will elect not to publish a statement in the media such as the Galveston Daily News or Houston Chronicle. The parties will through their attorneys prepare a short, joint statement which be used by employees of the Rental Program or the Board in response to questions about this suit or other related matters.

WHEREFORE, PREMISES CONSIDERED, the parties request the Court to take notice of the filing of this presentation.

Respectfully submitted,

MILLS, SHIRLEY, ECKEL & BASSETT, L.L.P.

By: *George Vie*
GEORGE W. VIE III

Federal ID No. 12402
State Bar No. 20579310
2228 Mechanic Street,
400 Washington Bldg.
P. O. Box 1943
Galveston, Texas 77553
(409) 763-2341 or
(713) 488-8716
FAX: (409) 763-2879

Attorneys for Plaintiff
ISLANDER EAST RENTAL PROGRAM

FULBRIGHT & JAWORSKI, L.L.P.

By: *Ronald G. Bliss*
RONALD G. BLISS
State Bar No. 02494500
MATHIAS W. SAMUEL
State Bar No. 00791596
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
FAX (713) 651-5246

Counsel for Defendants

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ISLANDER EAST RENTAL PROGRAM
and J. RAY RILEY
VS.
BILL FERGUSON, ET AL.
VS.
J. RAY RILEY

C. A. NO. G-95-404

ORDER

The above provisions are approved by the Court.

SIGNED and ORDERED ENTERED this 2nd day of August, 1995.

SAMUEL B. KENT
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ISLANDER EAST RENTAL PROGRAM and J. RAY RILEY *Plaintiffs,* V. BILL FERGUSON, ET AL. *Defendants,* V. J. RAY RILEY *Third-Party Defendant.*	Civil Action No. G-95-404

PLAINTIFFS' AMENDED NOTICE OF APPEAL

Notice is hereby given that the plaintiffs, the Islander East Rental Program and J. Ray Riley, hereby appeal to the United States Court of Appeals for the Fifth Circuit from (i) the Final Judgment entered in this action on November 5, 1996, (ii) from the Order entered in this action on November 21, 1996 denying Plaintiffs' Motion for New Trial and from any and all orders of the Court described in such motion which resulted in evidence concerning damages of the plaintiffs being excluded from the trial of this cause, and (ii) from the Order entered in this action on November 5, 1996 denying Plaintiffs' request that further proceedings be conducted in respect

of Defendants' alleged violations of the District Court's preliminary injunction and any resultant damages to the Plaintiffs.

Respectfully submitted,

ISLANDER EAST RENTAL PROGRAM
J. RAY RILEY

By: /s/ J. RAY RILEY

J. Ray Riley
West U. Plaza
6213 Edloe Street
Houston, Texas 77005
Telephone: (713) 667-1170

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISLANDER EAST RENTAL PROGRAM; J. RAY RILEY, *Plaintiffs-Appellants*	Case No. 96-41275
v.	
LOWRY BARFIELD; ELIZABETH PARR; JAMES B. PENNY; LOCKWOOD SEEGAR; ISLANDER EAST ASSOCIATION; BILL FERGUSON, *Defendants-Appellees*	Appeal from the United States District Court for the Southern District of Texas Galveston Division

APPELLANTS' PETITION FOR REHEARING

Plaintiffs-Appellants, Islander East Rental Program and J. Ray Riley, petition that the Court reconsider and withdraw its attached opinion filed in this appeal on March 24, 1998. In that opinion the Court affirmed in all material aspects the trial result reached below.[6] However, the Court did not address in its opinion the fundamental and critical issue raised at pages 29 through 38 of Appellants' Brief on appeal — the denial by the magistrate judge below of Appellants' Seventh Amendment right to a jury trial on all elements of their causes of action against Appellees.[7] Appellants argued this point at length during oral argument and brought to the

[6] The Court did remand to the magistrate judge for revision of the form of permanent injunction entered below. A revised judgment has now been entered, and the record has been returned to the Court. By order filed May 8, 1998 the Court extended until May 20, 1998 the time for filing this motion for rehearing.

[7] In footnote 4 of the Court's opinion the Court addressed Appellants' argument that it was entitled to a jury trial concerning damages for violation of an injunction. However, this argument was separate and distinct from Appellants' Argument III: "Appellants Have Been Denied Their Seventh Amendment Right to A Jury Trial On All

Court's attention at that time a list cases located related to Appellants' Seventh Amendment argument which were not cited in Appellants' Brief. A copy of that letter follows the Court's opinion attached to this motion.

By way of summary, at the beginning of the trial of this case the magistrate judge curtailed the issues that would be presented to the jury. The curtailment consisted of ordering the parties not to present to the jury evidence of any facts that came into existence after August 1, 1995, the date that the parties agreed to the entry of a mutual injunction relating to certain of their future actions pending trial. Seemingly the court's decision was based on its belief that its equity jurisdiction took precedence over the jury's fact finding function to the extent those facts may have come into existence after August 1, 1995. This curtailment had the effect of preventing the Appellants from presenting to the jury material evidence, including evidence of the Appellants' post-August 1, 1995 damages. (See Appellants' Brief at pages 30-31.) This curtailment prevented the Appellants from proving up their damages arising out of various causes of action asserted against the Appellees. By excluding from the jury's consideration evidence of Igloo's damages, the magistrate judge effectively foreclosed Appellants from proving an essential element of these causes of action — that is, that the Appellants had suffered damages. Without this proof it was not possible for the jury to return a verdict in favor of Appellants on any of its causes of action. Thus, Appellants were denied a meaningful jury trial because of the curtailment.

The maintenance of the jury as a fact-finding body is of such importance that any attempt to curtail the right to a jury trial must be scrutinized with the utmost care. *Bacon Theatres, Inc.* v. *Westover*, 79 S. Ct. 948, 952 (1959). Like the instant case, the Bacon case involved the district court's determination that it could properly decide legal issues, once it obtained jurisdiction, without

---

Elements Of their Causes of Actions Against Appellees, Particularly Proximate Cause and Damages". See page vi of Appellants' Brief.

deference to the right to trial by jury. See *Bacon Theatres* at p. 956. The Supreme Court emphasized that it could not then even think of a case where the right to a jury trial of legal issues could be lost through prior determination of equitable claims. *Bacon Theatres* at page 957. *Bacon Theatres* stands for the proposition that *any* legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. *Dairy Queen, Inc.* v. *Wood,* 82 S.Ct. 894, 897 (1962). The *Bacon Theatres* case was not followed by the magistrate judge below. He did not permit Appellants to develop their damages as a necessary element of their legal causes of action. It is prejudicial to a plaintiff who is deprived of the legitimate right to place before the jury the circumstances of his entire cause of action brought into court. *In re Beverly Hill Fire Litigation,* 695 F.2d 207, 217 (6th Cir. 1982).

In the *Dairy Queen* trademark case, the district court had refused a demand for a jury trial on factual issues related to the question of whether there had been a breach of contract. The Court of Appeals improperly denied a petition for mandamus, and the Supreme Court reversed and remanded for further proceedings consistent with its determination that a jury trial should have been granted. The Supreme Court importantly noted at the outset of its opinion that the right to trial by jury may not be lost as to legal issues where those issues are characterized as "incidental" to equitable issues. *Id.* at 896. Said another way, the presence of equitable elements does not deprive a party of the right to trial by jury on its legal claims. *In Re Jensen,* 946 F.2d 369, 373 (5th Cir. 1991). Appellants submit that under *Dairy Queen* it was plain error for the magistrate judge below to subject the legal issues of Appellants' damages arising after August 2, 1995 to his equity jurisdiction.

Similar in result is *Garcia* v. *Queen, Ltd.,* 487 F.2d 645 (5th Cir. 1973), where the district court abused its discretion in trying damage issues along with liability issues when the damage issues had been reserved for a jury trial. A party may not be deprived of the right to a jury trial because equitable claims coexist with legal

claims. *Bowls* v. *Bonnet*, 629 F.2d 1092, 1095 (5th Cir. 1980). Where a legal claim is joined with an equitable claim, the trial court must submit to the jury the factual issues common to both claims. *Rascal* v. *Southwest Airlines Co.*, 726 F.2d 217, 221 (5th Cir. 1984).

For the foregoing reasons, as supplemented by Appellants' Brief, the magistrate judge below misapplied governing legal standards and denied Appellants' Seventh Amendment right to a trial by jury. The appropriate remedy would be to reverse and remand this case for a new trial on the merits with costs being assessed against Appellees. Appellants pray for that relief.

RESPECTFULLY SUBMITTED,

J. Ray Riley, TBC 16927000
J. Ray Riley & Associates
6213 Edloe Street
Houston, Texas 77005
Telephone: (713) 667-1170

Pro Se and Attorney for
Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that he served a copy of the foregoing paper on Appellees' attorneys on May 19, 1998, by first class mail, postage prepaid, in an envelope addressed as follows:

Bennett Avram Midlo, Esq.
Preston Midlo
1900 West Loop S., Ste. 300
Houston, Texas 77027.

/s/ J. RAY RILEY
J. Ray Riley

Selected pages from:

VOLUME I
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE, AND A JURY

[page 91]

injunction.

THE COURT: All right. Well, I think and I guess in the last analysis that's what controls, that once that injunction was in place, any additional claims for damages after that date are going to be equity claims before the Court, and I don't think there's any way that I can sensibly let the jury hear it on some skirting issue, like you're suggesting, without causing all kinds of problems, plus I really think it's all incorporated under the injunction and whether or not the injunction was followed by the parties. So, we'll just deal with it that way.

MR. VIE: Should the plaintiffs understand the Court's ruling, then, that we simply will not talk about events that occurred after August 2?

THE COURT: I think that's right, unless there's some reason we need to. I mean, I think the Court got involved in the middle of this thing for injunctive relief and put something in place to say, "We're going to freeze this as it is today." Theoretically at least that should have meant that from there on out the status quo was maintained. Then any violation of the injunction that causes damages is something the Court needs to deal with because the parties did not operate under the spirit of the injunction. That's what the injunction did, as I can see it. It happened very quickly, so we've got this tiny little window of one month of

potential damages and what was going on in there, but the main claim is who owns the right to use the trademark, I would guess, and what's going to flow from there. And if it occurred after the injunction was imposed, then that seems to me to be an equitable claim that's going to have to be dealt with by the Court.

MR. VIE: Then my next question is, with respect to claims of breach of fiduciary duty or tortious interference or conversion of our property prior to the injunction, those things relating up to the abolishment, yet the act, the actual act that takes place is the decision on July 2 to abolish and shortly thereafter we're in the courthouse, what do the plaintiffs do — how can the plaintiffs go about to prove damages that might not have made themselves apparent until after — I mean, as the Court says, it's a very small window.

THE COURT: Yes, it is.

MR. VIE: You've got some acts that the plaintiffs contend are a breach of fiduciary duty with respect to this program, the decisions going several months back. But the decision — it becomes a legal cause of damages when the decision is made on July 2 to abolish and shortly thereafter we're in court. So, what does the plaintiff do in terms — are we simply going to try liability to the jury?

THE COURT: Well, I mean, that's exactly what it seems to me that we have to do, but we have to do it not

because I'm in your way but because of the maneuvering that happened in the lawsuit. You came in to court, filed the lawsuit, said, "We're being damaged. We're going to continue to be damaged. Judge, we would like you to stop it." The Judge stopped it.

MR. VIE: But he stopped us as well, Your Honor.

THE COURT: I know. But he said, "This is what I'm going to do." I mean, the fact that it may have backfired to some extent is of no moment. The Judge said, "From now on it's here. I want to establish the status quo." Any violations or problems that occurred after that, it seems to need to be dealt with by the Court, because now we're enforcing the injunction and whether or not the people behaved themselves after it was imposed. But you asked for an injunction. You, in effect, got one. You got more than you asked for, because of what Judge Kent did.

But, yeah, I think up until that point in time, whatever was happening out there is certainly at risk for the litigation mill, but once the Judge said, "This is it. I'm going to ride it from here and we'll see how it plays out and who's going to get rights to the trademark and any damages flowing after the injunction," seems to me are things that need to be imposed by the Court. And I don't see that that's really closing the avenue to any damages to you at all. It's just saying who is going to be the person who decides what

they are, and the evidence is going to be the evidence. And suppose I could let the jury give me some sort of advice on that. But if I do that, then I'm going to have to litigate everything that happened, like the injunction and what's happened after the injunction and the hearing on the 15th, all of which creates a big mess that I can cure by just saying, "Trust me. I'll do the best I can for you."

MR. VIE: I understand.

THE COURT: Okay.

MR. VIE: And the plaintiffs are not suggesting that they believe they're somehow foreclosed from damages. The question would be if the jury, for example, found that the events in April of that year were a breach of fiduciary duty, are they going to have an opportunity to try to determine some damages caused by that breach of fiduciary duty? For example, the fact that we had to come in to court, the fact that a lawyer had to be retained, those types of damages, or is the Court going to say, "That damages is essentially a matter for the Court sitting in equity and as a finder of fact"?

THE COURT: Now, injecting of any attorney's fees, haven't thought about that. But it would seem to me that if you can prove to the satisfaction of the jury that there was some breach of some tort you know, something that happened prior to that, you would be entitled to prove up damages that had occurred, if any, up until the day of the injunction, and

I would think that's it.

Now, whether or not that entitles you to attorney's fees and how much attorney's fees there will be and whether that's a jury question anyway in the federal court system, because most of the time it's not, and that may be the end of the situation there. Even if you would be entitled to them for breach of contract, for example, or whatever, they will be determined by me as the Judge after the trial is over anyway. So, if you hit on something that in turn will allow you to be awarded attorney's fees, then, you know, we're right back where we were. It will just be me making that decision, but it would be anyway, I think, over here.

MR. VIE: No, I understand that, as far as submission of attorney's fees and that type of thing.

THE COURT: Okay. You just threw me a curve ball and I didn't hit it right.

MR. VIE: But I would suggest, for example, that the juries are sometimes instructed that in awarding punitive damages, they may consider attorney's fees that a party incurred as an element.

THE COURT: Over in the state court they are, but I don't think they are in the Fifth Circuit authority. So, no, don't see that you're losing anything except the chance that the jury may want to heap on a lot more damages than the Court might feel to do so, but that's just one of those things. And